Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE UNITED STATES

CLARENCE FRACH, et al.,
Petitioners,

vs.

ROBERT J. SCHOETTLER, as Director of the Department of Fisheries of the State of Washington, et al.,
Respondents.

No. 230

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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CITATIONS

Cases:

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State Statute:

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No.....

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington, entered and become final in the above-entitled cause on April 20, 1955.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, as printed in Appendix C hereto, *infra*, p. 21, is reported in Vol. 146, Washington Decisions, page 265, not yet appearing in the official Washing-

ton Reports or in the Pacific Reporter. The order of the said Supreme Court denying petition for rehearing, as printed in Appendix E hereto, *infra*, p. 36, is reported in Vol. 146, Washington Decisions, page 443, not yet appearing in the official Washington Reports or in the Pacific Reporter.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was filed with the clerk of said court on March 10, 1955 (R. 61), and became a final judgment on April 20, 1955, when a timely (see Washington Rule of Court No. 50, as printed in pertinent part in Appendix F hereto, *infra*, p. 36) petition for rehearing, filed on April 8, 1955 (R. 71), as printed in pertinent part in Appendix D hereto, *infra*, p. 33, was denied (R. 82). The jurisdiction of this court is invoked under 28 U.S.C., section 1257(3), since there is drawn in question the validity of a state statute on the ground of repugnance to certain provisions of the Federal Constitution.

QUESTIONS PRESENTED

1. Whether a state-imposed tax upon vessel and crew members catching salmon beyond the territorial waters and transporting such salmon through territorial waters for delivery to domestic ports, which tax is not applicable (1) to vessels and crew members catching salmon within certain of the territorial

waters, i.e., in such shore waters as bays, inlets, canals, coves, sounds and estuaries; and (2) to vessels other than the catching vessel in which such salmon might be brought into and through the territorial waters, is not in the ultimate an impost or duty upon imports within the inhibitions of sections 8 and 10, Article I of the Federal Constitution, reserving to the Congress the power to lay and collect imposts or duties and to regulate interstate and foreign commerce and restricting the power of the states to lay imposts or duties on imports.

2. Whether a state statute which, in rendering unlawful the transportation through territorial waters of the state during certain seasons of salmon caught by a domestic vessel beyond such territorial waters, discriminates in favor of such salmon transported through such territorial waters during the same seasons by other than catching vessels should be upheld against the inhibitions of section 1 of the 14th Amendment to the Federal Constitution, that no state law shall abridge the immunities and privileges of United States citizens, and that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

3. Whether a state statute, which discriminates in favor of possession of salmon caught in certain terri-

torial waters of the state by rendering unlawful during certain seasons the possession of salmon caught beyond the territorial waters of the state, should be upheld against the constitutional inhibitions above mentioned.

STATUTE INVOLVED

The statutory provisions involved are sections 1 to 12, inclusive, of chapter 147, Laws of Washington of 1953. They are printed in Appendix A hereto, *infra*, p. 12.

HOW FEDERAL QUESTION IS PRESENTED

The petitioners herein originally brought this action as plaintiffs against the Washington state director of fisheries and others, alleging in their complaint that the said director's enforcement of said Chapter 147, Laws of 1953, as printed in Appendix A hereto, *infra*, p. 12, and of his own administrative order thereunder, as set forth in the complaint and so printed in Appendix B hereto, *infra*, p. 18, among others, violated sections 8 and 10, Article I, and the 14th Amendment to the United States Constitution. The trial court sustained a demurrer to said complaint. The Supreme Court of the State of Washington, by opinion printed in Appendix C hereto, *infra*, p. 21, affirmed the trial court, specifically holding the legislation and the administrative order

thereunder valid against the above-mentioned constitutional provisions. The petition for rehearing (See Appendix D, *infra*, p. 33) specifically elaborated petitioners' complaint, among others, along the lines presented in this Petition for Certiorari (R. 72,73), and the said petition for rehearing was thereafter by said Supreme Court denied without comment.

STATEMENT OF THE CASE

The petitioners herein are one hundred thirty-two commercial salmon trollers, each a citizen of Washington state, operating his own fishing vessel, and engaged in the business of catching, dressing and icing salmon exclusively beyond the territorial waters of the state, that is in the waters of the Pacific Ocean more than three miles beyond the shores of the states of Washington, Oregon and California and of the Province of British Columbia in the Dominion of Canada—no salmon or other fish being caught within Washington territorial waters. Salmon so caught, dressed and iced, without commingleement with any fish taken in Washington territorial waters, is transported in the catching vessel through said territorial waters for sale and delivery in Washington ports.

The statute involved purports to be an exercise of the state's police power looking to conservation of the salmon resource. It creates two fisheries districts, District No. 1 comprising the Straits of Juan de Fuca and the waters of the Pacific Ocean over which the state has jurisdiction, *exclusive of bays, inlets, canals, coves, sounds and estuaries*, and District No. 2 comprising all lands and waters over which the state has jurisdiction, excepting therefrom District No. 1 (Section 2 — See Appendix A, *infra*, p. 13). The statute forbids the commercial taking of fresh silver

and chinook salmon from District No. 1 during certain seasons of the year (Sections 3 and 4—See Appendix A, *infra*, p. 14), and makes it unlawful for any person for commercial purposes to have in possession or to transport through the waters of District No. 1 any fresh silver or chinook salmon taken either from District No. 1 or from the waters of the Pacific Ocean during such seasons (Sections 5 and 6—See Appendix A, *infra*, p. 14). The statute also provides that every person operating a fishing vessel used in taking chinook or silver salmon in off-shore waters which transports the same through the waters of the state and delivers them in any port or place in the State of Washington shall obtain an annual permit from the director of fisheries at a fee of $10.00 for the vessel and $10.00 for each crew member (Section 9 — See Appendix A, *infra*, p. 15). Finally the statute invests the director of fisheries with regulatory powers (Section 11—See Appendix A, *infra*, p. 16).

Petitioners commenced their action below by a complaint setting forth two separate causes of action. The first sought a judgment adjudicating the permit requirement of the statute void and unconstitutional, among other things, in the light of sections 8 and 10, Article I, and of section 1 of the 14th Amendment to, the Federation Constitution. The second sought

an order restraining the defendants from enforcing any of the statutory provisions against petitioners, on the ground that the statute violated the provisions of sections 8 and 10, Article I, and of section 1, the 14th Amendment to, the Federal Constitution.

A general demurrer having been sustained as to each cause of action by the trial court, and judgment rendered accordingly, an appeal was taken to the Washington Supreme Court, which latter then sustained the judgment below. A timely petition for rehearing, having been filed, was by the said court denied without comment.

REASONS FOR GRANTING WRIT

1. As to Question No. 1 hereinabove presented

To the extent that the instant legislative act purports, under the guise of a conservatory police power, to tax only vessels and crews taking salmon on the high seas and transporting the same through territorial waters into the state, while exempting from tax (1) vessels and crews, other than the catching vessel, so transporting such salmon, and (2) vessels and crews taking and so transporting salmon in the shore waters of the state as distinguished from the "offshore" waters, the regulatory or conservatory characteristic of the legislation is nugatory. That being so, the tax can be nothing but a state-levied impost or duty on imports within the clear inh

bition of sections 8 and 10, Article I, the Federal Constitution.

There is nothing subtle about the erosion of principle here involved. One of our major industries, affording to the coastal states and to the nation a veritable lifeline, is thus laid under state siege and, more importantly, the commerce clauses, constitutionally designed as bulwarks against such siege, have now been breached. The exercise of this court's supervisory power could provide a present remedy for what is considered by petitioners a real damage to constitutional principle.

2. As to Questions Nos. 2 and 3 hereinabove presented

Unlike the prohibitory state law outlawing *any and all* possession of certain game animals, whether taken within or without the state during particular closed seasons, which law this court upheld as a valid exercise of police power in face of the commerce and due process clauses of the Federal Constitution in *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 53 L. Ed. 75, 29 S. Ct. 10 (1908); and unlike the regulatory state law imposing a tax upon *all* ferries, including those carrying passengers and goods from points within to points without the state, which law this court upheld as a valid exercise of police power in face of the commerce clause in *Wiggins Ferry Co.*

Co. v. East St. Louis, 107 U.S. 365, 27 L. Ed. 419, 2 S. Ct. 257 (1882), the instant legislative act, together with its subordinate administrative orders, on its face and by its terms discriminates in the matter both of transportation and possession between high seas fishermen and fishermen in certain territorial waters, on the one hand, and, on the alternative, fishermen in other territorial waters such as bays, inlets, canals, coves, sounds and estuaries.

To the extent that the holding of the Supreme Court of Washington premises the constitutional validity of the instant legislative act upon the holdings of this court in the *Silz* and *Wiggins Ferry Co.* cases, *supra*, and upon similar United States Supreme Court holdings of earlier or later vintage, it presents a dangerous and unwarranted state extension of federal doctrine which (1) will perforce deny to the *discriminandi*, citizens of the United States engaged in an industry of major importance and consequence, their guaranteed rights as to privileges and immunities, due process and equal protection of the laws under the 14th Amendment of the United States Constitution; (2) will do violence to the commerce clauses of said Constitution; (3) will likely provide the respectability of precedent for legislative and judicial fiat against citizens in other states engaged in the same industry and in other industries; and (4), un-

checked, could well result, of itself and by further extension, in irreparable harm to all the citizenry, to the several states and to the nation as a whole.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated July 6, 1955.

APPENDIX A

CHAPTER 147
(S.B. 234)

Salmon Resources — Conservation — Regulations

"AN ACT relating to the salmon resources of the State of Washington; declaring a public policy; describing conditions detrimental to such resources; prescribing remedies and regulations; forbidding certain practices; imposing penalties; providing for permits; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. The State of Washington has a major and substantial interest in the fisheries and fishing industry within its boundaries and a special interest in its salmon resources. Salmon within the waters of the state, including its coastal waters and offshore waters contiguous thereto, constitute a commercial asset and a vital food resource in which the state of Washington has a special interest, in that such salmon spawn in the fresh water streams of the state of Washington, migrate to the sea and, in response to their anadromous cycle, return to the fresh water streams of Washington, from which they originate, to spawn and die. Serious conditions and hazards detrimental to the preservation of this salmon supply have arisen and are now present, both in the fresh water streams of the state of Washington and in the salt waters of bays, inlets, canals, coves, sounds and estuaries, and in its coastal waters and offshore waters contiguous thereto, as a result of the extensive catching and taking of silver and chinook salmon within the described waters in such quantities as substantially to deplete the spawning and the source of existing and future salmon supplies and resources.

The preservation of the salmon industry and the salmon resources of the state of Washington is vital

to the state's economy, and effective measures and remedies are necessary to prevent loss of such salmon resources due to the taking of immature fish and salmon present in the state's coastal and offshore waters, from which waters such salmon migrate, feed and return to the streams of this state to spawn.

It has proven impossible in seeking to regulate catching and taking of such salmon to distinguish between salmon taken from waters of the Pacific Ocean over which the state has jurisdiction and those taken outside the limits of the state's jurisdiction and brought within the boundaries of the state.

Research by the department of fisheries of the state has established that silver and chinook salmon found in the waters of district No. 2 and the Columbia river district, as herein defined, are substantially mature salmon. The silver and chinook salmon found during certain periods within the waters of district No. 1, herein defined, are for the most part immature salmon, the taking of which would prevent the return of an adequate number of such salmon to the spawning grounds in the streams of the state and risk the destruction or substantial depletion of the state's salmon resources, and would constitute an irreparable economic waste.

Sec. 2. The following fishery districts are hereby created:

(1) District No. 1, as used in this act, shall include the Straits of Juan de Fuca and the waters of the Pacific ocean over which the state of Washington has jurisdiction, exclusive of bays, inlets, canals, coves, sounds and estuaries.

(2) District No. 2, as used in this act, shall include all lands and waters over which the state of Washington has jurisdiction, excepting therefrom district No. 1, as herein defined.

Sec. 3. It shall be unlawful for commercial purposes to fish for or take in the waters of district No. 1, as herein defined, silver salmon (Oncorhynchus kisutch) between the first day of November and the fifteenth day of June of the year following, both dates inclusive.

Sec. 4. It shall be unlawful for commercial purposes to fish for or take in the waters of district No. 1, as herein defined, chinook salmon (Oncorhynchus tschawytscha) between the first day of November and the fourteenth day of March of the year following, both dates inclusive.

Sec. 5. It shall be unlawful for commercial purposes for any person to have in his possession or transport through the waters of district No. 1, as herein defined, any fresh silver salmon (Oncorhynchus kisutch) taken from said waters or from the waters of the Pacific ocean during the period from the first day of November and the fifteenth day of June of the year following, both dates inclusive.

Sec. 6. It shall be unlawful for commercial purposes for any person to have in his possession or transport through the waters of district No. 1, as herein defined, any fresh chinook salmon (Oncorhynchus tschawytscha) taken from said waters or from the waters of the Pacific ocean during the period from the first day of November and the fourteenth day of March of the year following, both dates inclusive.

Sec. 7. It shall unlawful for any person in the state of Washington engaged in the business of canning, packing, processing, freezing, salting, smoking, kippering, preserving in ice, or otherwise involved in dealing in or curing any food fish or shellfish, or in wholesale selling of food fish or shellfish for commercial purposes, to have in his possession any silver salmon (Oncorhynchus kisutch) caught or taken during the period from the first day of November of any

year to the fifteenth day of June of the following year from the waters of the Pacific ocean or district No. 1.

Sec. 8. It shall be unlawful for any person in the state of Washington engaged in the business of canning, packing, processing, freezing, salting, smoking, kippering, preserving in ice, or otherwise involved in dealing in or curing any food fish or shellfish, or in wholesale selling of food fish or shellfish for commercial purposes, to have in his possession any chinook salmon (Oncorhynchus tschawytscha) caught or taken during the period from the first day of November of any year to the fourteenth day of March of the following year from the waters of the Pacific ocean or district No. 1: *Provided*, That with respect to the closed season defined in this act, the director of fisheries, upon due notice and hearing, and upon investigation, may, in accordance with his judgment, vary any of the opening or closing dates thereof. Notice of such hearing shall appear in not less than two issues of a newspaper of general circulation at the state capitol.

Sec. 9. Every person or persons, firm or corporation operating a fishing vessel of any description used in the commercial taking or catching of chinook or silver salmon in offshore waters and the transporting or bringing the same in and through the waters of the state of Washington and delivering the same in any place or port in the state of Washington shall, as a condition of doing so, obtain a permit from the director of fisheries. The fee for said permit shall be ten dollars for the vessel and ten dollars for each member of the crew thereof, such permit to be effective during the fiscal year in which issued: *Provided*, That persons operating fishing vessels licensed under RCW 75.28.080 and RCW 75.28.100 shall not be required to pay any permit fees hereunder: *Provided further*, That if it appears to the director of fisheries, after investigation, that the operation of

such vessel under such permit tends to result in the impairment, depletion, or destruction of the salmon resource and supply of this state and in bringing into this state salmon products prohibited by law, in that event, the director under such regulations and terms as he may prescribe may revoke said permit to use and operate such boat in the waters of this state, and in the event of the revocation of such permit, the further operation of such vessel as hereinabove set forth shall then be unlawful.

Sec. 10. The several provisions of this act are hereby declared to be separate and severable, and if any clause, sentence, paragraph, subdivision, section or part thereof shall, for any reason, be adjudged invalid, or the applicability thereof to any person, circumstance or product adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of the act, and the applicability thereof to other persons, circumstances or products shall not thereby be affected, but such judgment, if any, shall be confined in its operation to the particular clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 11. Nothing herein shall be construed to restrict or impair the authority of the director of fisheries consistent with and pursuant to the provisions of this act from issuing and publishing such regulations as, after investigation, he may deem necessary to administer this act and to effectuate its purposes, or to administer and effectuate all other acts governing or affecting the department of fisheries, nor shall anything herein be construed to restrict or impair the authority of the director to issue and publish regulations he may find necessary under the provisions of The Pacific Marine Fisheries Compact.

Sec. 12. This act is necessary for the immediate preservation of the public peace, health and safety,

the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate March 3, 1953.
Passed the House March 9, 1953.
Approved by the Governor March 17, 1953.

APPENDIX B

That on or about the 31st day of May, 1953, the defendant Robert J. Schoettler, Director of Fisheries of the State of Washington, purporting to act by virtue of the authority in him vested by Fisheries Code of the State of Washington Chapter 112 of the Laws of Washington and as amended by Sections 1 to 9inclusive of Chapter 147 of the 1953 Session Laws of the State of Washington, did make, adopt and promulgate certain amendments to General Order No. 256 of the Orders of the Director of Fisheries, and which said Order and amendments as far as these plaintiffs are concerned provide as follows, to-wit:

Fishing allowed during Nov. 1 through March 15 or June 15:

1. Columbia River:
   Lawful to fish commercially for salmon in Columbia River Areas as follows:
   a. Area No. 1 (Below Bonneville Dam)
      April 30 to May 27th
      Sept. 10 to December 1
      Jan. 29 to March 1
      (Order 256 as Amended by Order 334. 2/11/53)
   b. Area No. 2 (Above Bonneville)
      May 13 to June 9
      Sept. 10 to Dec. 1
      Jan. 29 to March 1
      (Same order as above)
   c. Area No. 3 (Klickitat River)
      April 30 until June 7
      (Same order as above)

d. Area No. 4 (Grays Bay)
October 10 to December 15.
(Same order as above)

2. Grays Harbor:
Lawful to fish for or possess SALMON:
a. Grays Harbor Area No. 1 taken with GILL NETS July 16 through December 15
(Order 256 amended by Order 336. 4/3/53)

3. Willapa Harbor:
Lawful to fish for ANY SALMON:
a. With GILL NET in Area No. 2 July 16 to Dec. 15.
(Apparently this is Order No. 256 — Can't find amendments.)

4. Puget Sound:
a. Lawful to fish for or possess ANY SALMON with PURSE SEINES:

Areas 1 and 2 June 15 to Nov. 30
Areas 3, 4, 5, 6, 14 Oct. 5 through Nov. 30
Areas 8 and 10 Oct. 20 through Nov. 30
(Order 256 Amended by 338) 4/29/53

b. Lawful to fish for or possess ANY SALMON with GILLNETS:

Area 1 March 15 through Nov. 30
Areas 2 through 9 June 15 through Nov. 30
Area 9A Oct. 20 through Nov. 20
Areas 10, 12, 14 June 15 through Nov. 30

c. Puget Sound lawful to take or possess any salmon with REEF NET:

Areas 1 and 2 June 15 through Nov. 30
Area 3 Oct. 5 through Nov. 30

d. Lawful to take or possess Any Salmon with DRAG SEINES:

Areas 1 and 2, June 15 through Nov. 30

Areas 3, 4, 5, 6, 14 Oct. 15 through Nov. 30

Areas 8 and 10 Oct. 20 through Nov. 30

(Same order as above)

APPENDIX C

(No. 32952. *En Banc.* March 10, 1955.)

CLARENCE FRACH, et al., Appellants, v. ROBERT J. SCHOETTLER, as Director of the State Department of Fisheries, et al., Respondents.

(1) Constitutional Law—Statutes—Validity—Burden of Proof.
(2) Same—Police Power—Nature and Scope—Presumptions.
(3) Statutes—Determination of Validity—Legislative Declaration—Judicial Authority and Duty.
(4) Fish—Constitutional Law—Police Power—Regulation and Conservation of Salmon.
(5) Constitutional Law — Class Legislation — Regulation of Fishermen.
(6) Same—Delegation of Power—To Administrative Boards—Authority to Make Rules and Regulations.
(7) Same—Commerce—Fish—Licenses—Fishing Locations—Regulation.
(8) Fish—Constitutional Law—Police Power—Regulation of Salmon Industry — Permit Fees.
(9) Same—Commerce—Regulation—Salmon Industry—Permit Fees.
(10) Same—Salmon Industry—State Regulation —Possession and Sale.
(11) Constitutional Law—Police Power—Fishing Industry—Public Policy—Regulation.
(12) Same—Construction of Constitutional Provisions—"Due Process Clause" and "Privilege and Immunity Clauses" — Legislative Process—Police Power.
(13) Declaratory Judgments — Pleading — Demurrer.

Appeal from a judgment of the superior court for Thurston county, No. 27358, Wright, J., entered

March 29, 1954, upon sustaining a demurrer to the complaint, dismissing an action for injunctive relief and for a declaratory judgment. Affirmed.

Fred M. Bond, Smith Troy, and Philip W. Richardson, for appellants.

The Attorney General, Joseph T. Mijich, and Thomas A. Swayze, Jr., Assistants, for respondents.

OTT, J.—This action was brought by one hundred thirty-two fishermen against the director of the department of fisheries of the state of Washington and the state treasurer, for the purpose of testing the validity of chapter 147, Laws of 1953, p. 287 [cf. RCW (Sup. 1953) 75.18], in so far as this act affects the rights of the plaintiffs to catch salmon exclusively beyond the territorial waters of the state, and to make a sale and disposal of them within the state boundaries during certain seasons.

Plaintiffs sought an injunction against enforcement of this act upon the ground that it is unconstitutional and, therefore, void, and that much of the authority granted to the director constitutes an unlawful delegation of legislative power. By an alternative cause of action, plaintiffs sought a declaratory judgment decreeing and adjudicating the statute void.

A demurrer to the second amended complaint of the plaintiff was sustained by the trial court. Plaintiffs declining to plead further, the action was dismissed with prejudice. The appeal to this court was taken from the judgment of dismissal.

Plaintiffs (hereinafter referred to as appellants) are residents of this state, and the owners of commercial fishing vessels, fishing exclusively three miles beyond the shores of the state of Washington, which is outside the territorial limits of the state. Although the appellants fish commercially for other fish, in this action they are concerned only with the regulatory provisions of the act in question as it applies to their

salmon fishing activities. After the salmon are caught and cleaned, they are brought into the state and sold to canneries. By §1 of the act, the legislature determined that it is impossible to distinguish the salmon that are caught outside the state boundaries from those caught within the territorial waters of Washington.

The questioned sections of the act provide generally as follows:

Section 1 declares the state legislative policy concerning the salmon industry.

Section 2 creates two fishery districts, district No. 1, which includes the Straits of Juan de Fuca and the waters of the Pacific ocean over which the state has jurisdiction, exclusive of bays, inlets, canals, coves, sounds, and estuaries, and district No. 2, which includes all waters over which the state has jurisdiction, excepting therefrom district No. 1.

Sections 3 and 4 forbid commercial fishing for silver salmon in the waters of district No. 1 between November 1st and June 15th, and for chinook salmon between Novmber 1st and March 14th.

Section 5 forbids possession or transportation through the waters of district No. 1 of silver salmon taken from those waters or from the Pacific ocean during the period from November 1st to June 15th.

Section 6 makes the same provision relative to chinook salmon for the period from November 1st to March 14th.

Sections 7 and 8 make it unlawful for any processor, canner, and so forth, to have in his possession silver or chinook salmon taken from the waters of district No. 1 or the Pacific ocean during the closed seasons specified. Section 8 also authorizes the director, upon due notice and hearing, to vary the opening and closing dates of the fishing seasons.

Section 9 provides that anyone operating a commercial fishing vessel used for catching chinook or silver salmon in offshore waters, and transporting them in and through the waters of the state for delivery to any place or port in the state, shall obtain a permit from the director of fisheries. The fee for this permit is ten dollars for the vessel and ten dollars for each member of its crew. The section further empowers the director to revoke permits for violation of regulations.

On or about May 31, 1953, the director adopted certain amendments to General Order No. 256 of the Orders of the Director of Fisheries. These amendments extended the open season in certain areas within the state for those using various types of fishing gear.

(1) It is a well established rule that one who attacks the constitutionality of a law, clearly has the burden of proof. *Shea v. Olson*, 185 Wash. 143, 151, 53 P. (2d) 615, 111 A.L.R. 998 (1936), and cases cited; *Sears v. Western Thrift Stores of Olympia*, 10 Wn. (2d) 372, 116 P. (2d) 756 (1941); *Martin v. Tollefson*, 24 Wn. (2d) 211, 163 P. (2d) 594 (1945); *Gruen v. State Tax Comm.*, 35 Wn. (2d) 1, 211 P. (2d) 651 (1949); *Miller v. Howe Sound Min. Co.*, 77 F. Supp. 540, 11 Am. Jur. 776, Constitutional Law, §128.

(2,3) Every law is presumed to be in the interest of the public welfare. *Tacoma v. Fox*, 158 Wash. 325, 290 Pac. 1010 (1930). See, also, *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 53 L. Ed. 75, 29 S. Ct. 10 (1908). In the instant case, §1 of the act declares the public policy of this state. This court cannot dispute this legislative finding, or declaration of policy. *State ex rel. Govan v. Clausen*, 108 Wash. 133, 183 Pac. 115 (1919); *State v. Miller*, 149 Wash. 545, 271 Pac. 826 (1928); *State ex. rel. Gray v. Martin*, 29 Wn. (2d) 799, 804, 189 P. (2d) 637 (1948), and

cases cited; *State ex rel. Pennock v. Coe*, 42 Wn. (2d) 569, 573, 257 P. (2d) 190 (1953), and cases cited.

With these fundamental principles in mind, we must next determine whether the exercise of the power delegated to the director by the act is within the police power reserved to a sovereign state.

> "It is well established that, by reason of the state's control over fish within its limits, it is within the police power of the state, subject to constitutional restrictions, to impose by legislative enactment such restrictions and limitations on the catching of fish as may be reasonably necessary for the protection and regulation of the public's rights therein, even to the extent of restricting the use of, or right of property in, the fish after they are taken, and of obliging all citizens to conform to such regulations by inflicting penalties for the violation of them." 36 C.J.S. 857, Fish, §26.

This court, in defining police power, stated:

> "However difficult it may be to give a precise or satisfactory definition of 'police power,' there is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people . . . the only limitation upon it (police power) is that it must reasonably tend to correct some evil or promote some interest in the state, and not violate any direct or positive mandate of the constitution." *Shea v. Olson, supra*, p. 153.

See, also, *State v .Walter Bowen & Co.*, 86 Wash. 23, 149 Pac. 330 (1915); *Parrott & Co. v. Benson*, 114 Wash. 117, 194 Pac. 986 (1921); *State v. Sears*, 4 Wn. (2d) 200, 205, 103 P. (2d) 337 (1940), and cases cited; *Lane v. Department of Labor & Industries*, 21 Wn. (2d) 420, 427, 151 P. (2d) 440

(1944), and cases cited; *State v. Dexter*, 32 Wn. (2d) 551, 554, 202 P. (2d) 906, 13 A.L.R. (2d) 1081 (1949), and cases cited.

(4) We conclude that regulation and conservation of our salmon industry, as defined in the questioned act, promote the "good order and welfare of the people," and hence are clearly within the police power of the state.

We turn now to the consideration of appellants' assignments of error.

Appellants contend that the trial court erred in allowing the director to enforce §9 of the act. This section requires the fishermen to obtain a permit for themselves and for the boat they operate, and to pay a fee therefor. It is contended that this part of the act constitutes class legislation and attempts to delegate power to the director of fisheries in violation of Art. I, §§8 and 10, of the United States constitution, and Art. I, §§3, 7, and 12, of the constitution of the state of Washington.

(5) We cannot agree that this act constitutes class legislation or is discriminatory. All commercial fishermen, catching and transporting salmon in Washington waters, are required to obtain a permit and pay the same fee. See §9 of the questioned act (RCW 75.18.080), and RCW 72.28.080, 72.28.100. There is no distinction as to types of equipment used or where the user thereof may be fishing. All who come within the provisions of the statutes are equally affected thereby.

In *State v. Hennessy*, 114 Wash. 351, 361, 195 Pac. 211 (1921), we said:

> "The legislature has power to pass all needful police regulations and so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts."

Does the act unlawfully delegate legislative power to the director? The general question has been considered by this court in the following cases: *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922); *McMillan v. Sims*, 132 Wash. 265, 231 Pac. 943 (1925); *State v. Nelson*, 146 Wash. 17, 261 Pac. 796 (1927); *State v. Miles*, 5 Wn. (2d) 322, 105 P. (2d) 51 (1940); *Senior Citizens League v. Department of Social Security*, 38 Wn. (2d) 142, 153, 228 P. (2d) 478 (1951), and cases cited.

These cases recognize the distinction between the power to legislate and the power to administer. The delegated authority is simply ministerial. In *Vail v. Seaborg, supra*, which declared lawful a similar delegation of power to the director of fisheries, we said (p. 130):

> "The recognized distinction in matters of this kind, however, is between the power to legislate and the power to administer.
>
> "The great increase in the duties of the governing bodies has brought about a demand that matters in which the general public are interested shall be governed in their details to an extent impracticable to be attended to by the legislative bodies which meet only biennially, and statutes of this character are passed to meet the situation . . . . It is a well known fact that the salmon industry of the state is rapidly disappearing and the legislature declares its purpose to protect and perpetuate it."

In *McMillan v. Sims, supra*, we said (p. 270):

> "Here is a plain, express and specific delegation, not of non-delegable legislative power, but of delegable power, to prescribe territorial limits within which fish in the state's waters may or may not be taken."

(6) There is no question that the legislature may

delegate the power to make rules and regulations relating to the taking of fish and game, within a stated policy of protection and conservation of our natural resources. *Senior Citizens League v. Department of Social Security, supra*, p. 153.

We find no merit in appellants' contention that legislative powers have been unlawfully delegated to the director.

Appellants contend that §9 violates Art. I, §8 of the United States constitution, which provides, in part:

> "The congress shall have power . . .
>
> "To regulate commerce with foreign nations, and among the several states, . . ."

(7) With this we do not agree. It should be stated at the outset that, according to §9 of the act, only vessels and crews which bring their catch through the waters within the jurisdiction of this state, or deliver the catch to ports within this state, are required to have a permit. It is not necessary for other vessels fishing in the ocean off our coast to obtain a permit. If boats fishing outside the three-mile limit were not included in the permit requirement when they enter Washington waters, it would defeat the purpose of the act. The operator of any boat within the three-mile limits, heading for port, could claim that the fish were caught more than three miles from shore and, therefore, he would not be within the jurisdiction of the act.

In *Mirkovich v. Milnor*, 34 F. Supp. 409 (1940), a case dealing with a similar regulation, it was stated (p. 412):

> "If this latter power (to regulate fishermen outside California territorial waters) were denied to the state, it would clearly result in the practical deprivation to the state of its undoubted right

to regulate the taking of fish from within its territorial waters."

See, also, *State v. Belknap*, 104 Wash. 221, 176 Pac. 5 (1918); *Johnson v. Gentry*, 220 Cal. 231, 30 P. (2d) 400, 92 A.L.R. 1264 (1934); *New York ex rel. Silz v. Hesterberg*, *supra*.

(8) Appellants next argue that, even though the permit is found to be a valid exercise of the police power, the ten-dollar fee is invalid because it bears no relation to the general welfare of the state. The regulation of our salmon industry for conservation purposes certainly bears directly on our state's general welfare. As is pointed out in *State v. Miller*, *supra* (p. 549):

> "The legislature, in the protection of its own property, may impose a regulation upon other property which never belonged to it, if in its opinion such a regulation is needed."

That such regulations in this state are needed, is clearly pointed out by the legislative declaration in §1 of the act.

In *Wiggins Ferry Co. v. East St. Louis*, 107 U.S. 365, 27 L. Ed. 419, 2 S. Ct. 257 (1882) the court stated:

> "The levying of a tax upon vessels . . . or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States."

We find no merit in appellants' contention.

(9) Appellants' next contention is that §9 of the act violates Art. 1, §10, of the United States constitution, which provides:

> ". . . No state shall, without the consent of

the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: . . ."

The act does not levy a tax upon the catch, or upon the size or weight of the fish, or upon any item of import. The permit fee is a charge assessed upon the men engaged in the work and upon the boat, and is for the purpose of regulation and conservation of our salmon industry.

Counsel for appellants rely upon *Booth Fisheries Corp. v. Case*, 182 Wash. 392, 47 P. (2d) 834 (1935). The statute in the *Booth* case levied a tax on the fish and was designed as a "catch tax." In this respect, the *Booth* case is readily distinguishable from the case at bar. The permit fee is nominal. The act is not a revenue measure. Regulatory fees paid are not subject to the constitutional restrictions on the power to tax. *McQueen v. Kittitas County*, 115 Wash. 672, 198 Pac. 394 (1921).

Since the permit fee imposed by the act is in no sense a tax upon imports, we find no merit in appellants' contention that the act is in violation of Art. I, §10, of the United States constitution.

(10) Appellants next contend that the trial court erred in upholding the director's action in enforcing those sections (5,6,7,8) of chapter 147, Laws of 1953, which prohibit appellants from possessing and selling fish within this state during certain seasons.

We hold that the possession and sale of the salmon by appellants are subject to state regulation and supervision, and what has heretofore been said concerning permits and fees applies equally to possession and sale. Even though the taking is beyond our jurisdiction, the possession and sale are within our jurisdiction, and appellants are subject to state regulation.

In *Bayside Fish Flour Co. v. Gentry*, 297 U.S.

422, 80 L. Ed. 772, 56 S. Ct. 513, the court said (p. 426):

> "Sardines taken from waters within the jurisdiction of the state, and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy."

Appellants' next contention is that the trial court erred in upholding the director's action in enforcing General Order No. 256, as amended. The regulation does not deny appellants the right to enter into the areas where the fishing seasons are open, and to fish in those areas with certain prescribed equipment, and to dispose of the fish so obtained. Their rights and privileges in this regard are equal to those of all who are engaged in the like business of fishing. What has been said before with reference to class legislation, and the power of the director to make the regulation, applies to the action of the director in this regard. See *McMillan v. Sims, supra.*

(11) With reference to appellants' contention that there has been a violation of Art. I, §7, of the state constitution, we hold that the fishing industry is not a private affair of the appellants. It is an affair of great public interest and concern. *Wiegardt v. Brennan*, 192 Wash. 529, 73 P. (2d) 1330 (1937); *State v. Dexter, supra*, p. 557.

(12) Appellants' rights with reference to the "due process clause" and the "privilege and immunity clauses," as set out in Art. I, §§3 and 12, of the state constitution, and in §1 of the fourteenth amendment to the United States constitution, are not abridged by the act in question. It is the established

rule in Washington that none of these constitutional provisions applies to laws enacted by the state legislature in the exercise of its police power. *Seattle v. Gervasi*, 144 Wash. 429, 258 Pac. 328 (1927); *Shea v. Olson, supra; Lane v. Department of Labor & Industries, supra; Senior Citizens League v. Department of Social Security, supra.*

(13) Finally, it is contended that, upon a petition for a declaratory judgment, a demurrer should not be sustained, but that the matter should be heard upon its merits.

A reading of the entire declaratory judgment act convinces us that a proceeding commenced under the provisions of the act is subject to the same rules of pleading as any other civil action.

We are of the opinion that none of the assignments of error merits sustaining the contentions of the appellants.

We hold that chapter 147, Laws of 1953, is a valid act and does not violate or abridge any of the state or Federal constitutional rights or guarantees of the appellants.

The judgment of the trial court is affirmed.

ALL CONCUR.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLARENCE FRACH, et al.,
Appellants,
vs.
ROBERT J. SCHOETTLER, as Director of the Department of Fisheries of the State of Washington, et al.,
Respondents.

No. 32952
PETITION FOR RE-HEARING

Come now the above named appellants and file this a petition for re-hearing in the above entitled cause and for the following reasons:

FIRST

That appellants feel the opinion of said court has not given due consideration to all of their rights and principles involved in said cause, and that in justice to all parties this being an important case to both appellants and respondents that this petition for re-hearing is a necessity.

SECOND

This action was brought testing the validity of Chapter 147, Laws of 1953 (See RCW Chapter 75.18), as far as this act affects the rights of the plaintiffs to catch salmon exclusively beyond the territorial waters of the state, and make a sale and disposal of them within the state's boundaries during certain seasons.

THIRD

The opinion of this court will be found in Wash. Dec. Vol. 146 No. 10 March 23, 1955, pages 265 to 294 inclusive, and on pages 267, 268 the court said:

A. It is a well established rule that one who attacks the constitutionality of a law, clearly has the burden of proof. (Citing cases).

B. Every law is presumed to be in the interest of the public welfare. (Citing cases).

C. This court cannot dispute this legislative finding, or declaration of policy. (Citing cases).

FOURTH

Appellants do not dispute the principles of law mentioned in the preceding number of paragraph, however they do feel in all due respect to the members of this court that the cases cited under each of those principles of law above stated, are not applicable to the facts involved in this case as far as they affect the appellants, are concerned. Before discussing these cases in this petition for re-hearing we wish to call the court's attention to the following facts.

(1) Section 2 of the act defines District No. 1 as the Straits of Juan de Fuca and the three miles of State controlled Pacific waters, EXCEPT BAYS, SOUNDS, INLETS, ESTUARIES, ETC.

Since all State controlled Pacific waters are not affected by the prohibitions and requirements of Sections 3 to 9 inclusive of the Act, the legislature violates both the Federal and State Constitutions for the identical same reason that the legislation considered in *State v. Belknap* (104 Wash. 221) was held violative of the law, viz: the exception of Sound and other State controlled Pacific waters and the exception of State controlled waters other than Pacific defeats the purpose of the legislation which is the only justification for the legislation.

(2) The provision of Section 9 prohibiting a fishing vessel from transporting fish thru the waters of the State and delivering them in a State port is

discriminatory against such vessel contrary to the Federal and State Constitutions.

It will be noted that transportation by means of another vessel through such waters is not prohibited, that transportation by air is not prohibited, that transportation through such waters with delivery at an out of state port, is not prohibited.

(3) Section 9 of the Act requires a permit at the rate of $10.00 for the vessel and $10.00 for each member of the crew only with reference to a person, firm or corporation operating a vessel (1) used in taking salmon in off-shore waters and (2) transporting or bringing the same in and through the waters of the State of Washington and (3) delivering the same in any place or port in the State of Washington. No permit is required of a person, firm or corporation operating a fishing vessel used in the taking of salmon in off-shore waters (1) if the transportation of the salmon to a port or place in the State of Washington is by air; or (2) if the transportation of the salmon to a port or place in the State of Washington is by another vessel; and (3) if the transportation is through the waters of the State of Washington but the delivery of the fish is in a place or port outside the State of Washington. It would appear then that the imposition of a multiple fee for certain vessels and their crew members is in fact not designed for regulatory purposes, since regulation is really not sought for or achieved, and the imposition can only be considered as a levy or a tax for revenue purposes and therefore must be illegal in the light of the cases cited by appellants. * * * *

APPENDIX E

(No. 32952. April 20, 1955.)

CLARENCE FRACH et al., Appellants, v. ROBERT J. SCHOETTLER, as Director of the State Department of Fisheries, et al., Respondents.

(Reported in 146 Wash. Dec. 265)

Petition for rehearing denied.

APPENDIX F

RULE 50

PETITIONS FOR REHEARING

(Adopted November 17, 1952; effective January 2, 1953.)

Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing.

Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined. * * * *

FILED
AUG 9 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

CLARENCE FRACH, *et al.*, *Petitioners*,
vs.
ROBERT J. SCHOETTLER, as Director of the Department of Fisheries of the State of Washington, *et al.*, *Respondents*.

No. 230

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT

OF THE

UNITED STATES

CLARENCE FRACH, *et al.*, *Petitioners*,

vs.

ROBERT J. SCHOETTLER, as Director of the Department of Fisheries of the State of Washington, *et al.*, *Respondents.*

No. 230

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

SUPREME COURT

OF THE

UNITED STATES

CLARENCE FRACH, *et al.*, *Petitioners*,

vs.

ROBERT J. SCHOETTLER, as Director of the Department of Fisheries of the State of Washington, *et al.*, *Respondents*. } No. 230

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents pray that a writ of certiorari not be issued to review the judgment of the Supreme Court of the state of Washington because the issues raised herein have previously been decided with the same result by the Supreme Court of the United States.

OPINIONS BELOW

All nine justices of the Supreme Court of the state of Washington agreed to an opinion reported in 146

Wash. Dec. 265 (R. 61), and denied a petition for rehearing reported in 146 Wash. Dec. 443 (R. 82).

JURISDICTION

The opinion of the Supreme Court of the state of Washington was filed with the clerk of said court on March 10, 1955 (R. 61). A petition for rehearing was denied on April 20, 1955 (R. 82). The petition for a writ of certiorari was filed on July 13, 1955. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Is a state law repugnant to the federal constitution which prohibits the possession of salmon in state waters during a certain season, regardless of whether those salmon were taken in closed waters within the state or were taken in offshore (nonstate) waters adjacent thereto?

2. Is a state law repugnant to the Federal Constitution which requires all persons operating fishing vessels in offshore (nonstate) waters to obtain a state permit *if* they transport such vessels within the state and deliver their catch within the state, for which permit they must pay a fee of ten dollars per boat plus ten dollars for each crew member, in light of the fact that fishermen operating vessels exclusively within state waters are required to obtain a similar permit and pay an identical fee?

The questions presented by petitioners on pages 2-4 of their brief are misleading since they imply that

the permit fee is a tax on imports and that such fee is not required of vessels and crew members operating within state waters. This is not true. The permit is a license for the privilege of using state waters and is not a tax on the fish. Also, RCW 75.28.080 and RCW 75.28.100, as printed in pertinent part in Appendix B hereto, infra, page 18, require a similar permit and identical fee of vessels and crew members operating within state waters. Petitioners also imply that a non-catching vessel delivering salmon within the state is immune from the permit requirement. It should first be noted that such a class of vessels does not exist in fact and has not been alleged to exist in the pleadings. However, if such class did exist, it would come within the identical permit requirement of RCW 75.28.100 (Appendix B).

Petitioners also imply that a non-catching vessel may transport salmon through closed state waters. This is not true. Sections 5 and 6 of the statute involved (Appendix A) prohibit "*any person*" from transporting salmon through closed state waters whether taken (by anyone) in such waters or in offshore (nonstate) waters adjacent thereto.

STATUTE INVOLVED

The statutory provisions whose constitutionality are in question are Sections 1 through 12 of Chapter 147, Laws of Washington of 1953. They are printed in Appendix A hereto, infra, pages 12-18.

As an aid to construe the above statute, there is printed in pertinent part in Appendix B hereto, infra, page 18, RCW 75.28.080 and RCW 75.28.100, which are Section 1, Chapter 207, Laws of Washington of 1953 and Section 8, Chapter 271, Laws of Washington of 1951, respectively.

ADDITIONAL STATEMENT OF THE CASE

The following facts should be added to petitioner's statement of the case:

Section 1 of the statute involved sets forth certain legislative findings of fact and a declaration of policy (Appendix A). In the third paragraph of said section, the legislature found that it is impossible to distinguish between salmon taken from waters of the Pacific Ocean over which the state has jurisdiction (District No. 1) and those taken in adjacent waters outside the limits of the state's jurisdiction. In the fourth paragraph of said section, the legislature found that the salmon in the waters of District No. 2 are substantially mature salmon, whereas those found in the waters of District No. 1 are for the most part immature salmon. Therefore, this Court may judicially notice that the salmon found in District No. 1 (state waters) are distinguishable from those found in District No. 2 (state waters); however, the salmon found in District No. 1 (state waters) are indistinguishable from those found in adjacent offshore (nonstate) waters.

REASONS FOR DENYING WRIT

The judgment of the Supreme Court of the state of Washington is correct and is not in conflict with any federal decisions so as to warrant further review of the case by this court.

1. As to Question No. 1 hereinabove presented:

It is necessary as a conservation measure for the state to prohibit possession of salmon in closed state waters even if the salmon were taken in adjacent nonstate waters. The reason for this is that fish in the offshore (nonstate) waters cannot be distinguished from those in the inshore (state) waters, and therefore, the law is necessary to prevent the possibility of fraud or deceit being practiced during the closed season by fishermen claiming that the fish were taken in offshore waters (outside three-mile limit) when in fact they were taken in adjacent inshore waters (inside three-mile limit).

This court has approved similar legislation in *Silz v. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75, 29 S. Ct. 10 (1908), despite the fact that in that case, state and nonstate game was readily distinguishable and the state could have protected the local supply by more stringent regulation and inspection without affecting out-of-state game. This is not possible in the instant case as the fish in offshore and inshore waters are indistinguishable. Therefore, this is all the more reason why this statute should be upheld.

The statute involved herein does not regulate the

operations of the petitioners while they are in nonstate waters as did the legislation in *Skiriotes v. Florida*, 313 U. S. 69, 85 L. Ed. 1193 (1941), which this court upheld despite this seemingly apparent repugnance to the constitution.

2. As to Question No. 2:

The permit requirement is necessary in order for the state to effectuate the exercise of its police powers to protect its fishery resources. To do this, the state must be able to identify and have some measure of control over those persons operating in offshore (nonstate) waters when they use the state's waters to transport and deliver fish, and to charge a reasonable fee to effectuate this control. It is not a tax on imports since it is not based on the extent of the catch. It is merely a license to use state waters. It must also be borne in mind that vessels and crew members fishing in state waters must obtain a similar permit and pay an identical fee (Appendix B). It would defeat the purpose of this act to except therefrom vessels fishing in offshore (nonstate) waters. Any vessel operator actually taking fish in inshore state waters could claim that his catch was taken in adjacent offshore (nonstate) waters. In this way, the state would lose its control over persons taking fish in state waters.

The Court, in the case of *Mirkovich v. Milnor*, 34 F. Supp. 409 (1940), upheld a similar California statute.

This Court, in the case of *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, page 426, 80 L. Ed. 772

(1935), upheld the constitutionality of a law licensing sardine reduction plants and prohibiting them from taking sardines during certain seasons. It was argued that the law did not apply to sardines taken outside the three-mile limit. In rejecting this, this Court said:

> "The plain purpose of the measure simply is to conserve for food the fish found within the waters of the state. Over these fish and over state wild game generally, the state has supreme control. Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply and thus tends to effectuate the policy of the law by rendering evasion of it less easy."

This Court has been consistent in upholding a state's right to license vessels used in interstate commerce when they come within the jurisdiction of the state. See *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257 (1882).

CONCLUSION

For the foregoing reasons, respondents respectfully urge that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents.

APPENDIX A

CHAPTER 147

(S. B. 234)

Salmon Resources—Conservation—Regulations

"An Act relating to the salmon resources of the State of Washington; declaring a public policy; describing conditions detrimental to such resources; prescribing remedies and regulations; forbidding certain practices; imposing penalties; providing for permits, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. The State of Washington has a major and substantial interest in the fisheries and fishing industry within its boundaries and a special interest in its salmon resources. Salmon within the waters of the state, including its coastal waters and offshore waters contiguous thereto, constitute a commercial asset and a vital food resource in which the state of Washington has a special interest, in that such salmon spawn in the fresh water streams of the state of Washington, migrate to the sea and, in response to their anadromous cycle, return to the fresh water streams of Washington, from which they originate, to spawn and die. Serious conditions and hazards detrimental to the preservation of this salmon supply have arisen and are now present, both in the fresh water streams of the state of Washington and in the salt waters of bays, inlets, canals, coves, sounds and estuaries, and in its coastal waters and offshore waters contiguous thereto, as a result of the extensive catching and taking of silver

and chinook salmon within the described waters in such quantities as substantially to deplete the spawning and the source of existing and future salmon supplies and resources.

The preservation of the salmon industry and the salmon resources of the state of Washington is vital to the state's economy, and effective measures and remedies are necessary to prevent loss of such salmon resources due to the taking of immature fish and salmon present in the state's coastal and offshore waters, from which waters such salmon migrate, feed and return to the streams of this state to spawn.

It has proven impossible in seeking to regulate catching and taking of such salmon to distinguish between salmon taken from waters of the Pacific Ocean over which the state has jurisdiction and those taken outside the limits of the state's jurisdiction and brought within the boundaries of the state.

Research by the department of fisheries of the state has established that silver and chinook salmon found in the waters of district No. 2 and the Columbia river district, as herein defined, are substantially mature salmon. The silver and chinook salmon found during certain periods within the waters of district No. 1, herein defined, are for the most part immature salmon, the taking of which would prevent the return of an adequate number of such salmon to the spawning grounds in the streams of the state and risk the destruction or substantial depletion of the state's salmon re-

sources, and would constitute an irreparable economic waste.

Sec. 2. The following fishery districts are hereby created:

(1) District No. 1, as used in this act, shall include the Straits of Juan de Fuca and the waters of the Pacific ocean over which the state of Washington has jurisdiction, exclusive of bays, inlets, canals, coves, sounds and estuaries.

(2) District No. 2, as used in this act, shall include all lands and waters over which the state of Washington has jurisdiction, excepting therefrom district No. 1, as herein defined.

Sec. 3. It shall be unlawful for commercial purposes to fish for or take in the waters of district No. 1, as herein defined, silver salmon (Oncorhynchus kisutch) between the first day of November and the fifteenth day of June of the year following, both dates inclusive.

Sec. 4. It shall be unlawful for commercial purposes to fish for or take in the waters of district No. 1, as herein defined, chinook salmon (Oncorhynchus tschawytscha) between the first day of November and the fourteenth day of March of the year following, both dates inclusive.

Sec. 5. It shall be unlawful for commercial purposes for any person to have in his possession or transport through the waters of district No. 1, as herein defined, any fresh silver salmon (Oncorhynchus kisutch) taken from said waters or from the waters of

the Pacific ocean during the period from the first day of November and the fifteenth day of June of the year following, both dates inclusive.

Sec. 6. It shall be unlawful for commercial purposes for any person to have in his possession or transport through the waters of district No. 1, as herein defined, any fresh chinook salmon (Oncorhynchus tschawytscha) taken from said waters or from the waters of the Pacific ocean during the period from the first day of November and the fourteenth day of March of the year following, both dates inclusive.

Sec. 7. It shall be unlawful for any person in the state of Washington engaged in the business of canning, packing, processing, freezing, salting, smoking, kippering, preserving in ice, or otherwise involved in dealing in or curing any food fish or shellfish, or in wholesale selling of food fish or shellfish for commercial purposes, to have in his possession any silver salmon (Oncorhynchus kisutch) caught or taken during the period from the first day of November of any year to the fifteenth day of June of the following year from the waters of the Pacific ocean or district No. 1.

Sec. 8. It shall be unlawful for any person in the state of Washington engaged in the business of canning, packing, processing, freezing, salting, smoking, kippering, preserving in ice, or otherwise involved in dealing in or curing any food fish or shellfish, or in wholesale selling of food fish or shellfish for commercial purposes, to have in his possession any chinook salmon (Oncorhynchus tschawytscha) caught or taken during the

period from the first day of November of any year to the fourteenth day of March of the following year from the waters of the Pacific ocean or district No. 1: *Provided*, That with respect to the closed season defined in this act, the director of fisheries, upon due notice and hearing, and upon investigation, may in accordance with his judgement, vary any of the opening or closing dates thereof. Notice of such hearing shall appear in not less than two issues of a newspaper of general circulation at the state capitol.

Sec. 9. Every person or persons, firm or corporation operating a fishing vessel of any description used in the commercial taking or catching of chinook or silver salmon in offshore waters and the transporting or bringing the same in and through the waters of the state of Washington and delivering the same in any place or port in the state of Washington shall, as a condition of doing so, obtain a permit from the director of fisheries. The fee for said permit shall be ten dollars for the vessel and ten dollars for each member of the crew thereof, such permit to be effective during the fiscal year in which issued: *Provided*, That persons operating fishing vessels licensed under RCW 75.28-.080 and RCW 75.28.100 shall not be required to pay any permit fees hereunder: *Provided further*, That if it appears to the director of fisheries, after investigation, that the operation of such vessel under such permit tends to result in the impairment, depletion, or destruction of the salmon resource and supply of this state and in bringing into this state salmon products prohibited

by law, in that event, the director under such regulations and terms as he may prescribe may revoke said permit to use and operate such boat in the waters of this state, and in the event of the revocation of such permit, the further operation of such vessel as hereinabove set forth shall then be unlawful.

Sec. 10. The several provisions of this act are hereby declared to be separate and severable, and if any clause, sentence, paragraph, subdivision, section or part thereof shall, for any reason, be adjudged invalid, or the applicability thereof to any person, circumstance or product adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of the act, and the applicability thereof to other persons, circumstances or products shall not thereby be affected, but such judgment, if any, shall be confined in its operation to the particular clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 11. Nothing herein shall be construed to restrict or impair the authority of the director of fisheries consistent with and pursuant to the provisions of this act from issuing and publishing such regulations as, after investigation, he may deem necessary to administer this act and to effectuate its purposes, or to administer and effectuate all other acts governing or affecting the department of fisheries, nor shall anything herein be construed to restrict or impair the authority of the director to issue and publish regula-

tions he may find necessary under the provisions of The Pacific Marine Fisheries Compact.

Sec. 12. This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate March 3, 1953.
Passed the House March 9, 1953.
Approved by the Governor March 17, 1953.

APPENDIX B

CHAPTER 207, LAWS OF WASHINGTON OF 1953
(RCW 75.28.080)

"Sec. 1. A personal commercial fishing license shall be obtained by each and every person who takes or assists in taking any fish or shellfish, except razor and hard shell clams, from the waters or beaches of the state for commercial purposes.

The fee for such license is ten dollars per annum.

* * * *"

CHAPTER 271, LAWS OF WASHINGTON OF 1951
(RCW 75.28.100)

"* * * *

Sec. 8. A license is required for each and every commercial vessel which delivers or lands fish or shellfish within the state, for which license there shall be paid a fee of ten dollars per annum: *Provided*, That nothing in this section shall apply to vessels operated by any person having an oyster or clam farmer's license and used exclusively for that purpose.

* * * *"